88-25

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE CELOTEX CORPORATION, *et al.*,
Petitioners,

v.

JOHN HOWARD GRIMES, and
DORIS E. SAUNDERS, Personal Representative
of the Estate of Melvin H. Saunders,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) sets forth a three-part test for use in determining whether a judicial decision will be applied retroactively to pending cases. In light of this Court's recent decisions and due to confusion and circuit conflicts regarding the application of the *Chevron* test, the question presented is:

1. Whether a circuit court should consider all precedent, not just selected precedent, in determining the existence of "clear past precedent" when applying the *Chevron* test.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Fourth Circuit Court of Appeals whose judgment is sought to be reviewed in this Court were petitioners The Celotex Corporation, Owens-Corning Fiberglas Corporation, Fibreboard Corporation, Pittsburgh Corning Corporation, Armstrong World Industries, Inc. (formerly Armstrong Cork Company), Eagle-Picher Industries, Inc., Keene Corporation, Owens-Illinois, Inc., Porter-Hayden Company, Raymark Industries, Inc., and The Asbestos Textile Institute.

The respondents before this Court include John H. Grimes and Doris E. Saunders, Personal Representative of the Estate of Melvin H. Saunders.*

The Celotex Corporation, a party to this appeal, is a subsidiary of the Jim Walter Corporation, a publicly owned corporation. Although the Jim Walter Corporation is not a party to this appeal, it does have a financial interest in the outcome of this case.

Eagle-Picher Industries, Inc., a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

The Owens-Corning Fiberglas Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

The Keene Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

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* The following were parties to the original appeal to the Fourth Circuit but their claims were not part of the Fourth Circuit's Judgment below: Clara Faulk Long, Administratrix and Personal Representative of the Estate of Norman Long, Deceased; Eleanor M. Adams, Administratrix and Personal Representative of the Estate of Norman Long, Deceased; Matilene S. Shank, Executrix and Personal Representative of the Estate of Charles G. Shank, Deceased; Kathryn C. Furlough, Executrix and Personal Representative of the Estate of Isaac Furlough, Deceased. Accordingly, these parties are not respondents in the present case.

The H. K. Porter Company, Inc., a party to this appeal, is an affiliate of Fansteel, Inc., a publicly owned corporation. Fansteel, Inc. is not a party to this appeal, and does not have a financial interest in the outcome.

The Fibreboard Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

Pittsburgh Corning Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

Armstrong World Industries, Inc. (formerly Armstrong Cork Company), a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

Owens-Illinois, Inc., a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

Porter-Hayden Company, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

Raymark Industries, Inc., a party to this appeal, is a wholly owned subsidiary of Raymark Corporation which is a wholly owned subsidiary of Asbestos Litigation Management Corporation. Although Raymark Corporation and Asbestos Litigation Management Corporation are not parties to this appeal, they have a financial interest in the outcome of this case.

The Asbestos Textile Institute is an unincorporated association with no interest in the outcome of this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 843 F.2d 815 and appears in the Appendix at A. 1a. The opinion of the United States District Court for the Eastern District of Virginia is published at 643 F. Supp. 198 and appears in the Appendix at A. 12a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered April 8, 1988, reversed and remanded the order of the United States District Court for the Eastern District of Virginia, New-

port News/Norfolk Divisions. This Petition for a Writ of Certiorari was filed within ninety days of the Fourth Circuit's judgment.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Va. Code Ann. § 8.01-243(A) provides:

> Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

46 U.S.C. § 763(a) provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

STATEMENT OF THE CASE

Melvin H. Saunders and John H. Grimes were employed by Virginia shipyards until they became disabled by alleged asbestos related injuries. Asserting both diversity and admiralty jurisdiction, Saunders filed suit on December 9, 1983, and Grimes filed suit on May 30, 1984. Both suits were filed in the United States District Court for the Eastern District of Virginia, alleging injurious exposure to asbestos dust from thermal insulation products manufactured by the petitioners and used in the course of Saunders' and Grimes' employment. On June 6, 1986, petitioners moved to dismiss the two claims as time barred by Virginia's two-year statute of limitations. *Va. Code Ann.* § 8.01-243(A). In opposition, respondents asserted that the applicable limitations period for their shipyard worker asbestos claims was admiralty's three-year limitation. 46 U.S.C. § 763(a).

All parties stipulated that the suits were filed more than two years, but less than three years, after respondents' causes of action arose. Accordingly, the suits would be barred unless admiralty jurisdiction and its three-year limitation period applied.[1]

At the time respondents filed their suits, the United States Court of Appeals for the Fourth Circuit had decided *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (*White II*). *White II* was the first and only decision by a United States Court of Appeals to hold that admiralty jurisdiction extended to damage claims by land-based shipyard workers for injuries caused by asbestos exposure. By early 1983, shortly after *White II*, and many months before respondents' claims became barred by the Virginia statute of limitations, three United States Courts of Appeal had held that admiralty jurisdiction did not lie in shipyard worker asbestos cases. Each court explicitly declined to follow the Fourth Circuit's decision in *White II*. *See Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 9 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836, 844 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 971 (9th Cir. 1983). Thereafter, the Eleventh and Fifth Circuits joined the other circuits in rejecting *White II*. *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984).

Despite *White II*, petitioners, asserting the rulings of the other circuits, continued to object to admiralty jurisdiction. Eventually, the Fourth Circuit recognized its

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[1] Saunders also claimed that a recent amendment to the Virginia statute of limitations, *Va. Code Ann.* § 8.01-249.4, changing the time of accrual of the cause of action in cases of asbestos injury, should be applied retroactively to preserve his claim even if admiralty jurisdiction did not apply. The Fourth Circuit did not address this claim. Grimes' suit is barred even under the amendment.

error. In *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.) (*en banc*), *cert. denied*, 474 U.S. 970 (1985), the Fourth Circuit brought itself into line with the other circuits, holding that Virginia's two-year statute of limitations would apply to shipyard worker asbestos cases such as Grimes' and Saunders'. The Fourth Circuit further ruled that *Oman* would apply retroactively. *Oman*, 764 F.2d at 232. (A. 42a).

The District Court, in the instant case, decided that because of the Fourth Circuit's explicit handling of the issue, *Oman* applied retroactively to Grimes and Saunders. (A. 18a). Additionally, the District Court, addressing the three-part retroactivity test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), determined that Grimes and Saunders should not have relied on *White II* as past precedent, and that there was no evidence of such reliance. It further held that the purpose of *Oman* would be retarded if not applied retroactively, and that the equities involved favored retroactive application of *Oman*. (A. 22a-24a). Accordingly, the District Court dismissed the claims as time barred. (A. 27a).

Saunders and Grimes appealed from the District Court's ruling. On appeal, they argued that under *Chevron*, *Oman* should not apply retroactively to bar their claims. In opposition, petitioners cited *Oman*'s own holding that it applied retroactively, cited other Fourth Circuit precedent [2] and asserted that under the *Chevron* test, *Oman* applied retroactively.

After petitioners' Fourth Circuit brief had been filed, but before oral argument, this Court handed down its decisions in *Saint Francis College v. Al-Kahzraji*, —— U.S. ——, 107 S. Ct. 2022 (1987), *reh'g denied*, ——

[2] *Zemonick v. Consolidation Coal Company*, 762 F.2d 381 (4th Cir. 1985), *rev'd*, 796 F.2d 1546 (4th Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 107 S. Ct. 671 (1986).

U.S. ——, 107 S. Ct. 3244 (1987) and *Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S. Ct. 2617 (1987). The Fourth Circuit, relying on those opinions, reversed the District Court's decision in the instant case, holding that a court considering the first tier of the *Chevron* test should consider precedent only in the circuit where the case was pending. (A. 8a) In essence, according to the Fourth Circuit, other precedent was to be disregarded. The Fourth Circuit summarily considered the remaining two tiers of *Chevron* and concluded, despite the contrary language in *Oman*, that *Oman* should not be applied retroactively to bar Grimes' and Saunders' claims.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Application of the *Chevron* Test Conflicts With Governing Precedents of This Court and of Other Circuits.

The Fourth Circuit's judgment below turned on the issue of whether clear past precedent (*i.e.*, *White II*), existed upon which Grimes and Saunders may have relied in delaying the filing of their suits for more than two years. Disregarding the contrary opinions of the other circuits, the Court below held that *White II* constituted such precedent in the Fourth Circuit. However, *Chevron* does not state that "clear past precedent" is limited to precedent within the circuit where the case is pending. *Saint Francis College* and *Goodman* did not create a new test requiring a court to confine its review of "clear past precedent" to the circuit where the case is pending. This Court should grant this Writ to review the Fourth Circuit's misapprehension and misapplication of the *Chevron* test.

A. *Examination of Past Precedent Should Not Have Been Limited to That in the Fourth Circuit Where Said Precedent Was Erroneous and Had Been Rejected by Every Other Circuit Which Considered the Issue.*

The first tier of the *Chevron* test, as it applies to this case, requires that "the decision to be applied nonretroactively must establish a new principal of law . . . by overruling clear past precedent on which litigants may have relied." *Chevron Oil Company*, 404 U.S. at 106. Nowhere does *Chevron* require that a court, in determining whether such clear past precedent existed, put on blinders and limit its examination of precedent to a particular jurisdiction.

The Fourth Circuit's refusal to consider the decisions of other circuits when determining the existence and nature of past precedent is not mandated by *Chevron* and is not consistent with the application of *Chevron* in the other circuit courts, nearly all of which have looked to each other for precedent in applying the first tier of the *Chevron* test. *See, e.g., I.A.M. National Pension Fund, Plan A, A Benefits v. Clinton Engines Corp.*, 825 F.2d 415, 424 (D.C. Cir. 1987); *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 295-96 (8th Cir. 1987); *General Teamsters Union Local No. 174 v. Trick & Murray, Inc.*, 828 F.2d 1418, 1421 (9th Cir. 1987) (case from Third Circuit put party on notice of shorter limitations); *E.E.O.C. v. Texas Industries, Inc.*, 782 F.2d 547, 551 (5th Cir. 1986) (considering conflicts among the circuits); *Carter v. City of Chattanooga*, 803 F.2d 217, 221 (6th Cir. 1986); *Camden I. Condominium Ass'n, Inc. v. Dunkle*, 805 F.2d 1532, 1534 (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 3266 (1987); *United States v. Dunbar*, 767 F.2d 72, 74 (3d Cir. 1985) (criminal case applying *Chevron* factors); *Wycoff v. Menke*, 773 F.2d 983, 986 (8th Cir. 1985), *cert. denied*, 475 U.S. 1028 (1986); *Sears v. Atchison*,

Topeka and Santa Fe Ry. Co., 779 F.2d 1450, 1454 (10th Cir. 1985).

While this Court in *Saint Francis College* and *Goodman* discusses "circuit" precedent, the discussion relates back to *Chevron*. *E.g.*, *Goodman*, —— U.S. at ——, 107 S. Ct. at 2621. In *Chevron*, the litigant had relied not on a single case, but upon a "long line of decisions" by the Fifth Circuit. *Chevron*, 404 U.S. at 107. Indeed, even in *Saint Francis College* and *Goodman*, the decision in question had overruled not one, but a number of consistent Third Circuit decisions. *See Goodman*, —— U.S. at ——, 107 S. Ct. at 2621.

In contrast, *White II* was itself a decision of first impression, which was being contested by petitioners even within the Fourth Circuit, and which had been rejected by every other circuit which had considered the matter.

In so limiting its inquiry, the Fourth Circuit misapplied *Chevron* and has adopted an analysis contrary to *Chevron* itself and the other circuits. A review of the entire body of law as it existed before the running of the Virginia statute of limitations would have put Grimes and Saunders on notice that they should not rely on the Fourth Circuit's pioneer and erroneous decision in *White II*.

The mere existence of some past precedent without justifiable reliance thereupon is insufficient to satisfy the first tier of *Chevron*. In essence, if *Grimes* and *Saunders* did not justifiably rely on *White II*, then under *Chevron*, the limitations period in *Oman* should apply and their claims should be dismissed.[3] The Fourth Circuit totally

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[3] *See, e.g.*, *Lemon v. Kurtzman*, 411 U.S. 192, 206 (1973) (reliance must be reasonable); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 198 (1st Cir. 1987) (new rule must overturn the reasonable expectations of the party); *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 296 (8th Cir. 1987) (law nationally and in circuit was considered and party's reliance on neither was found to be justified); *Usher v. City of Los Angeles*, 828 F.2d 556, 560 (9th Cir.

ignored the District Court's detailed findings regarding Grimes' and Saunders' lack of justifiable reliance on *White II*. The District Court Judge, who was quite familiar with asbestos litigation in the Eastern District of Virginia, and who was also familiar with the attorneys involved in that litigation, found that aside from statements of counsel, there was nothing in the record to support a reliance argument. (A. 19a). The District Court stated that even if "plaintiffs relied on *White II*, that reliance would not have been reasonable or justified given the unsettled nature of the law prior to *Oman*." (A. 20a). The trial court noted that *White II* was a case of first impression in the country, upon which final judgment had not been entered, and which was reversed by the Fourth Circuit because it was erroneously decided in the first place. (A. 20a).

In early 1983, several months before either Grimes' or Saunders' suits would have been barred by Virginia's two-year statute of limitations, three circuits had specifically rejected *White II*. *See* cases cited *supra* at p. 3. The petitioners had consistently challenged the applicability of maritime law in shipyard worker asbestos cases, and counsel for plaintiffs and defendants were aware of these challenges and of the other circuits' rulings on this issue. (A. 21a). To paraphrase Judge Ervin's analysis in *Zemonick v. Consolidation Coal Co.*, 762 F.2d 381, 392 (4th Cir. 1985) (Judge Ervin's dissent in the first *Zemonick* decision was adopted as the majority opinion in 796 F.2d 1546 (4th Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 107 S. Ct. 671 (1986)), a local lawyer cannot simply ignore the significance of recent developments in federal courts which would warn

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1987); *Sears v. Atchison, Topeka and Santa Fe Ry. Co.*, 779 F.2d 1450, 1454 (10th Cir. 1985); *Landahl v. PPG Industries, Inc.*, 746 F.2d 1312, 1315 (7th Cir. 1984) (local lawyer cannot ignore significant developments in federal courts which would warn him not to place undue reliance on a particular local case which was likely to be overturned).

him not to place undue reliance on a particular precedent. *Oman* did not overrule clear past precedent on which anyone should have relied. It simply corrected an error which, in plenty of time for respondents to file suit, had been recognized as such by every other circuit which had considered the issue. To allow the instant decision to stand will place limitations on the retroactivity of decisions which the *Chevron* court never intended.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Fourth Circuit rendered on April 8, 1988.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 86-2586, 86-2587

JOHN HOWARD GRIMES,
Plaintiff-Appellant,

v.

OWENS-CORNING FIBERGLASS CORPORATION, a Delaware corporation; PITTSBURGH CORNING CORPORATION, a Pennsylvania corporation; CELOTEX CORPORATION, a Delaware corporation; FIBERBOARD COPORATION, Pabco Industrial Products Division, a Delaware corporation; ARMSTRONG CORK COMPANY, a Pennsylvania corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation; KEENE CORPORATION, a Delaware corporation; H.K. PORTER COMPANY, INC., Thermoid Division, a Delaware corporation; ASBESTOS TEXTILE INSTITUTE, an unincorporated trade association,
Defendants-Appellees.

DORIS E. SAUNDERS, Personal Representative of the ESTATE OF MELVIN H. SAUNDERS,
Plaintiff-Appellant,

and

MELVIN H. SAUNDERS; CLARA FAULK LONG, Administratrix and Personal Representative of the ESTATE OF NORMAN LONG; deceased; ELEANOR M. ADAMS, Executrix and Personal Representative of the ESTATE OF NORMAN LONG, deceased; MATILENE S. SHANK, Executrix and Personal Representative of the ESTATE OF CHARLES G. SHANK, deceased; KATHRYN C. FURLOUGH, Executrix and Personal Representative of the ESTATE OF ISAAC FURLOUGH, deceased,
Plaintiffs,

v.

PORTER-HAYDEN COMPANY,
a Maryland corporation,
Defendant-Appellee,
and

PITTSBURGH CORNING CORPORATION, a Pennsylvania corporation; CELOTEX CORPORATION, a Delaware corporation; EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation; OWENS-CORNING FIBERGLASS CORPORATION, KEENE CORPORATION, a Delaware corporation; H.K. PORTER COMPANY, INC., Thermoid Division, a Delaware corporation; RAYMARK INDUSTRIES, INC., a Connecticut Corporation; OWENS-ILLINOIS GLASS COMPANY, an Ohio Corporation; SOUTHERN TEXTILE COMPANY, a Delaware Corporation,
Defendants.

Argued Oct. 8, 1987

Decided April 8, 1988

Joel I. Klein, Washington, D.C., (Christopher D. Cerf, Onek, Klein & Farr, Washington, D.C., Robert R. Hatten, Patten, Wornom & Watkins, Newport News, Va., Richard Glasser, Glasser & Glasser, Norfolk, Va., on brief), for plaintiffs-appellants.

John Y. Perason, Jr. (Willcox & Savage, P.C., Norfolk, Va., Carter A. Anderson, Jr., Anderson & Padrick, Virginia Beach, Va., on brief), for defendants-appellees.

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, ERVIN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

ERVIN, Circuit Judge:

Plaintiffs Saunders and Grimes appeal from the dismissal of their asbestos claims as barred under the Virginia statute of limitations. *Va. Code Ann.* § 8.01-243 (A). They contend that the Virginia statute does not apply retroactively them, rather, admiralty law provides the proper limitations period. Alternatively plaintiff Saunders argues that an amendment changing the time of accrual for the Virginia statute of limitations to the date on which the diagnosis is communicated to the patient has retroactive effect and subsequently saves his claim. *Va.Code Ann.* § 8.01-249.4. We agree with Saunders and Grimes and find that the admiralty statute of limitations applies rather than that of Virginia state law. Accordingly, we reverse the district court's dismissal of plaintiffs' claims. We need not address the issue raised by Saunders concerning the retroactivity of the amendment to the Virginia statute of limitations.

I.

Melvin H. Saunders, now deceased, and John Howard Grimes were employed by shipyard companies until they became totally disabled by asbestosis. On November 6, 1981, Mr. Saunders was told by an examining physician that he possibly had asbestosis. This conclusion was not confirmed until March 16, 1982. On December 9, 1983, plaintiff Saunders filed this products liability action against various asbestos-related industries in the United States District Court for the Eastern District of Virginia.[1] Plaintiff Grimes was diagnosed as having asbestosis on February 22, 1982, and filed suit more than two years later on May 30, 1984.

On June 6, 1986, the defendant manufacturers moved to dismiss the plaintiff's claims as time-barred. Treat-

[1] Doris L. Saunders is the personal representative of the estate of Mr. Saunders in this action. We refer interchangeably to Melvin and Doris Saunders as plaintiffs.

ing the motions to dismiss as motions for summary judgment, the court dismissed the claims based on two findings.

First, the district court below found that the holding in *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985) (en banc) *cert. denied, Oman v. H.K. Porter Co.*, 474 U.S. 970, 106 S.Ct. 351, 88 L.Ed.2d 319 (1985), applied retroactively. In *Oman*, this court overruled *White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981) (*White II*), and held that admiralty jurisdiction does not extend to damage claims by land-based shipyard employees for damages induced by asbestos exposure.[2] The *Oman* plaintiffs filed their claims more than two years after the date on which their causes of action accrued. Pursuant to our ruling in that case, the claims were subject to Virginia's two-year statute of limitations[3] rather than admiralty's three-year statute

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[2] In *Oman*, this court adopted a nexus test by which we considered the following four factors in analyzing whether or not a given claim falls within admiralty jurisdiction: "(1) the function and role of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law." *Oman* at 230.

First, under the facts in *Oman*, defendant-manufacturers marketed maritime products; however, plaintiffs functioned as pipe coverers and insulators, not sailors. Second, the involvement of ships was incidental to the nature of plaintiffs' asbestos claims. Third, causes of asbestosis are not inherently linked to maritime activity. Fourth, the issues in plaintiffs' suits did not require the special expertise of a court in admiralty.

Only the initial part of the first factor favored plaintiffs' position. Thus, this court in *Oman* found that admiralty jurisdiction does not extend to asbestos suits by land-based shipyard employees.

[3] All parties involved accept that if admiralty jurisdiction is denied, Virginia's general two-year personal injury statute of limitations applies. *Va.Code Ann.* § 8.01-243(A). As previously noted, the parties here dispute the application of the statute's amendment. *Va.Code Ann.* § 8.01-249.4. We do not decide this question.

of limitations [4], and were thus barred.

In this case, Saunders and Grimes timely filed under the three-year admiralty statute of limitations. However, if the two-year Virginia limitations statute applies, Grimes' claim is barred, and Saunders' claim survives only if the 1985 amendment is applied retroactively.

Second, the district court found Saunders' alternative claim was not preserved by the 1985 amendment to the Virginia statute of limitations. Prior to July 1, 1985, actions for asbestos-induced injuries, like all personal injury actions, were deemed to accrue "from the date the injury is sustained in the case of injury to the person . . ." *Va.Code Ann.* § 8.01-230; *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E2d 900 (1981) Saunders stipulated that his disease was diagnosable as of November 6, 1981. As his complaint was not filed until December 10, 1983, Saunders' claim is barred under the general Virginia statute of limitations. Pursuant to *Va.Code Ann.* § 8.01-249.4 as amended July 1, 1985, asbestos claims accrue when a diagnosis of an asbestos-related disease is communicated to the patient. For Saunders, the date of communication was arguably March 16, 1982, placing his claim within the limitations period of the amended statute. The district court found that the amendment did not apply retroactively and dismissed Saunders' alternative claim.

II.

The primary issue before this court is whether the rule in *Oman*, requiring use of Virginia's two-year statute of

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[4] In *White* we found that the doctrine of laches applies to claims within admiralty jurisdiction. Pursuant to 46 U.S.C.App. § 763a, all maritime claims accruing since October, 1980, are controlled by a federal three-year statute of limitations. This change from laches to a federal statute of limitations is of no consequence in this case. Both sides stipulate, and the court agrees, that if admiralty jurisdiction is exercised, plaintiffs' claims are timely.

limitations instead of admiralty's three-year statute, applies retroactively to the cases at bar.

At first blush, the issue here is almost the same that this court faced in *Zemonick v. Consolidation Coal Co.*, 762 F.2d 381 (4th Cir.1985), *rev'd* 796 F.2d 1546 (4th Cir.1986) (en banc), *cert. denied*, —— U.S. ——, 107 S.Ct. 671, 93 L.Ed.2d 723 (1986). In *Zemonick*, we considered which statute of limitations applied to an employee suit against an employer and a union. Plaintiff had filed his action within the applicable state limitations period. While the case was pending, the Supreme Court established a six-month federal limitations period in an identical action. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). In *DelCostello*, the Supreme Court applied the new statute of limitations retroactively to the parties before it without undertaking the balancing test suggested by *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).[5] In *Zemonick*, this court ultimately held *en banc* that the absence of a *Chevron* test in *DelCostello* indicated that the new limitations period was to apply uniformly and not on a case-by-case basis. In dictum, we noted that even under a *Chevron* analysis, the new statute of limitations should apply retroactively.

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[5] In *Chevron*, the Supreme Court set forth three separate tests to be met in determining whether a decision should be applied other than retroactively.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application. . . .

Id. at 106, 107, 92 S.Ct. at 355, 355 (citations omitted).

The *DelCostello-Zemonick* line of analysis closely parallels the relationship between *Oman* and the claims of Saunders and Grimes. As with *DelCostello*, our holding in *Oman* did not include a *Chevron* analysis. The defendant manufacturers argue that *Zemonick* dictates that if the pivotal opinion establishing a new limitations period does not undertake a *Chevron* analysis, the new statute of limitations applies retroactively without exception. They contend that the omission of *Chevron* analysis in *Oman* signals that Virginia's two-year statute of limitations applies retroactively to Saunders' and Grimes' claims. It is clear that the district court agreed with this analysis when it found appellants' claims were untimely.

In light of two recent Supreme Court opinions, however, these comparisons between *Zemonick* and the cases before us are ineffective. In *St. Francis College v. Al-Khazraji*,— U.S. —, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987), and a follow up decision in *Goodman v. Lukens Steel Co.*, — U.S. —, 107 S.Ct. 2617, 96 L.Ed.2d 592 (1987), the Supreme Court did not focus on the controlling opinion's use or nonuse of the *Chevron* test when considering retroactivity. Instead, the Court looked at whether the law in the plaintiff's circuit was unclear at the time his or her cause of action accrued. This threshold factor for nonretroactivity is essentially the first of the three qualifications in the *Chevron* test.

In these two opinions, the Court emphasized that under *Chevron*, nonretroactivity is appropriate when a decision overrules "clear Circuit precedent on which the complaining party is entitled to rely." *Goodman* at 2621. Using this standard, the court applied a two-year statute of limitations, Pa.Stat. Ann. Tit. 12 § 34, retroactively in *Goodman* and prospectively in *St. Francis*. When Goodman filed his § 1981 claim in 1973, the Third Circuit had not ruled on which statute of limitations applied. In 1977, the Third Circuit, in a holding since overruled, established a six-year statute of limitations, Pa.Stat.Ann.

tit. 12 § 31, for § 1981 claims. *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894 (1977), overruled in *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3rd Cir. 1985). In 1980, during the time period when the six-year statute of limitations was clearly in effect, appellant in *St. Francis* filed his 1981 claim. In 1985, the Third Circuit in *Goodman* reversed itself and endorsed the two-year limitations period.

Because plaintiff Goodman had no clear indication of which statute applied, and thus incurred no detrimental reliance, the Supreme Court applied the new two-year statute of limitations retroactively. In *St. Francis*, the Court recognized that appellant did have clear circuit precedent on which he was entitled to rely. With this finding appellant satisfied the first tier of the *Chevron* test. Upon further examination, the Court also recognized that the requirements of the second and third tier were met, and endorsed nonretroactivity in *St. Francis*. Thus, in both cases, *Goodman* and *St. Francis*, the Supreme Court's decisions turned on whether there was "clear Circuit precedent on which the complaining party was entitled to rely." *Goodman* at 2621.

III.

In light of the holdings in *St. Francis* and *Goodman*, we do not apply automatically the new limitations period established in *Oman* to appellants' claims. Both Saunders and Grimes filed their suits when Fourth Circuit precedent clearly held that admiralty's three-year statute of limitations applied to such claims. When Saunders and Grimes filed their claims: 1) a unanimous panel of the Fourth Circuit had expressly held that admiralty jurisdiction applied to such cases, *White II*; 2) the Supreme Court had denied certiorari in *White II*; and 3) the Fourth Circuit had denied a later petition to reconsider *White II en banc*. Saunders and Grimes need not prove actual reliance on this precedent, but only the existence

of "past precedent on which litigants may have relied." *Chevron*, 404 U.S. at 106, 92 S.Ct. at 355.

Having found the threshold tier of the *Chevron* test satisfied, we subsequently consider the facts in terms of the second and third tiers. In *Cash v. Califano*, 621 F.2d 626 (1980), this court discussed the interrelated nature of the three *Chevron* factors, indicating each separate tier need not be fully satisfied in order to preclude retroactivity. *See, also Ramey v. Harber*, 589 F.2d 753, 757-60 (4th Cir.1978), *cert. denied*, 442 U.S. 910, 99 S.Ct. 2823, 61 L.Ed.2d 275 (1979). However, because we find in this case that the second and third factors are independently satisfied, it is unnecessary to balance the three tiers among themselves.

The second *Chevron* standard requires us to examine the purpose of the new statute of limitations and to determine whether retroactive application will further or retard its operation. Actually, this court did not create a new statute of limitations in *Oman*. We narrowed the scope of admiralty jurisdiction such that Virginia's pre-existing statute of limitations, *Va.Code Ann.* § 8.01-243 (A), now controls. We look to *Oman* to discern the purpose of the change in jurisdiction in order to consider the second *Chevron* factor.

In contrast to *Zemonick*, *Oman* does not identify a need for a national, uniform statute of limitations. Under the facts of *Zemonick*, we recognized that retroactive application filled a particular need for uniformity in labor law. "'[T]he importance of uniformity in limitations periods' in labor law which 'was a major consideration in the *DelCostello* opinion itself' favors retroactivity." *Zemonick*, 762 F.2d at 393, citing *Landahl v. PPG Industries, Inc.*, 746 F.2d 1312, 1315 (7th Cir.1984). Conversely in *Oman*, by limiting the exercise of admiralty jurisdiction, this court precluded the application of a uniform admiralty statute of limitation. Instead, each individual state determines the appropriate limitations

period. Thus the absence of a uniform application is not a major concern in the analysis of the second factor.

As stated in *Oman*, this court's purpose for refusing to exercise admiralty jurisdiction rests in great part on the federal courts' deference to the states' sovereign powers. "Virginia's statute of limitations is a matter of state concern, governed by state law, which we do not interfere with in this case." *Oman* at 232. Arguably, Virginia's sovereign powers are furthered by retroactive application of *Oman*. Upon closer look however, this court finds that nonretroactivity on such a limited scale as the one at bar does not infringe upon the sovereign rights of the Commonwealth of Virginia. Only a limited and identifiable class of possible claimants, those who were entitled to rely on *White II*, will be able to take advantage of the nonretroactive application of *Oman*. As discussed previously, these persons had absolutely no indication from this court that their claims would not fall within admiralty jurisdiction. The Virginia Supreme Court has held that the general policy of its limitations statutes is to prevent a plaintiff from purposefully delaying suit to the prejudice of the defendant. "In short, statutes of limitation serve an important and salutary purpose. Without them, defendants could find themselves at the mercy of unscrupulous plaintiffs who hoard evidence that supports their position while waiting for their prospective opponents to discard evidence that would help make a defense." *Burns v. Board of Supervisors of Stafford County*, 227 Va. 354, 315 S.E.2d 856 (1984). The concerns of the Commonwealth's Supreme Court do not arise with appellants' claims. There is no evidence that Saunders or Grimes delayed filing claims in order to sabotage appellees' defense. The manufacturers were not caught by surprise when Saunders and Grimes did file suit. For purposes of the second tier analysis, we find initially that no need exists for a national uniform statute of limitations. Furthermore, Virginia's express rationale for its limitations periods has not been abused. In light of these findings we hold that the narrow excep-

tion created by nonretroactive application for those plaintiffs who relied on *White II* does not violate the sovereign powers of the Commonwealth of Virginia. The second tier of the *Chevron* test is satisfied.

The third factor requires weighing the equities. Unlike the plaintiffs in *Zemonick*, Saunders and Grimes reasonably relied on clear circuit precedent when they filed their claims within the admiralty statute of limitations. Moreover, prospective application of *Oman* causes no gross inequity to appellee-manufacturers. At the time of Saunders' and Grimes' exposure, the manufacturers had no expectation that they would be shielded from liability by a change in admiralty law. Although all the parties came to court with clean hands, a balance of the equities favors Saunders and Grimes in light of their reliance on our ruling in *White II*.

Thus, under the *Chevron* analysis, we do not apply our ruling in *Oman* retroactively to the claims of Saunders and Grimes. The district court's summary judgment ruling in favor of the appellees is reversed.

In light of this ruling, we do not address the issue raised by Saunders regarding Va.Code Ann. § 8.01-249.4 and its retroactive application. The case is remanded to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

HAYNSWORTH, Senior Circuit Judge, concurring:

I think that consideration of the second *Chevron* factor leads to a conclusion that that factor is essentially neutral. I agree that a non-retroactive application of the new rule of *Oman* should not greatly offend any important policy of the Commonwealth of Virginia, but I cannot conclude that it furthers the policy enunciated in *Oman*.

Nevertheless, consideration of the first and third factors weigh so heavily against retroactive application that I fully concur in the result.

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
NEWPORT NEWS/NORFOLK DIVISION

Civ. A. Nos. 83-223-N, 84-90-NN and
84-362-NN and No. 77-1

MELVIN SAUNDERS,

Plaintiff,

v.

H.K. PORTER CO., INC., *et al.*,

Defendants.

and

GEORGE N. PRUDEN,

Plaintiff,

v.

OWENS-CORNING FIBERGLAS CORP., *et al.*,

Defendants.

and

JOHN HOWARD GRIMES,

Plaintiff,

v.

OWENS-CORNING FIBERGLAS CORP., *et al.*,

Defendants.

and

IN RE ALL ASBESTOS CASES

July 31, 1986

Robert R. Hatten, Donald N. Patten, Patten, Wornom & Watkins, Newport News, Va., for plaintiffs.

Carter A. Anderson, Jr., Anderson & Padrick, Virginia Beach, Va., for Porter Hayden Co.

AMENDED ORDER

CLARKE, District Judge.

With this Order, the Court VACATES its Order filed July 2, 1986. This matter comes before the Court on the defendants' motions to dismiss and motions for summary judgment in each of these three asbestos personal injury cases. The issues now before the Court involves the latest wrinkles in the legal debate over the applicable statute of limitations in asbestos cases where land-based ship repair workers received injuries allegedly caused by exposure to asbestos products. Because these questions may affect other shipyard worker asbestos cases now pending in the Eastern District of Virginia (collectively referred to as C/P 77-1), the Court requested and received briefs from lead counsel for C/P 77-1 as well as from the parties in the cases now before the Court. In addition, a hearing was held on June 11, 1986. Accordingly, these issues are ripe for disposition.

PROCEDURAL BACKGROUND

Confusion over the applicable statute of limitations arose because of uncertainty over whether a federal court's admiralty jurisdiction extends to asbestos cases where the plaintiffs are land-based shipyard workers. The issue was first presented to the Court in *White v. Johns-Manville Corp.*, No. 76-178-NN and No. 77-97-NN (E.D. Va. 1978). On March 31, 1978 in a pre-trial ruling in *White*, this Court ruled that admiralty jurisdiction did not extend to shipyard worker asbestos cases. When the *White* cases proceeded to trial in November of 1979, the Court applied Virginia law, including the two-year personal injury statute of limitations, § 8.01-243(A) of the Code of Virginia.

In January of 1980, following a judgment n.o.v. for the defendants, the *White* plaintiffs appealed the denial of admiralty jurisdiction. On October 5, 1981, a panel of the United States Court of Appeals for the Fourth Cir-

cuit reversed this Court and held that admiralty jurisdiction should have been exercised. *White v. Johns-Manville Corp.*, 662 F.2d 234, 240 (4th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 LEd.2d 319 (1982) ("White II") As a result, the equitable doctrine of laches applied to determine the timeliness of the action.[1]

The *White II* cases were then remanded to this Court. In pre-trial rulings on May 8, 1982, this Court followed *White II* and held that the cases came within the Court's admiralty jurisdiction. Following jury verdicts handed down in favor of the *White II* plaintiffs in the summer of 1982, defendants appealed, once again contesting the exercise of admiralty jurisdiction in shipyard worker asbestos cases. During the pendancy of that appeal, the defendants requested an *en banc* hearing to reconsider *White II*. Although this request was denied in March of 1983, the Fourth Circuit reconsidered its position and on June 6, 1984, *sua sponte* ordered an *en banc* hearing to determine whether *White II* should be overruled. Five days later the Honorable Robert F. Chapman, United States Circuit Judge, stayed all proceedings in cases pending in the Eastern District of Virginia involving "alleged maritime exposure to products containing asbestos" until the Court completed its *en banc* review of *White II*.

The Fourth Circuit's decision to reconsider *White II* was no doubt influenced by the treatment of this question in other circuits. During the period between the Fourth Circuit's issuance of *White II* and its decision to reconsider *White II*, five other Courts of Appeals had rejected the Fourth Circuit's position, ruling that admiralty jurisdiction was inappropriate in land-based shipyard worker asbestos cases.[2]

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[1] In 1980, 46 U.S.C. § 763a was enacted, providing in maritime tort cases the cause of action accrues when the plaintiff discovers his injury, and that three-year limitations period applied.

[2] *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir.

On June 5, 1985, the Fourth Circuit reversed *White II*, ruling that the state statute of limitations would apply, and thereby bringing the Fourth Circuit in line with the five other Courts of Appeals that had reached this issue. *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 232 (4th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 351, 88 L.Ed.2d 319 (1985).[3] Relying on *Oman*, the defendants in the three cases now before the Court filed either motions to dismiss or motions for summary judgment on grounds that the plaintiff's claims are time-barred. Because the parties present matters outside the pleadings on this question, the motions to dismiss will be treated as motions for summary judgment. F.R. Civ. P. 12(b).

FACTUAL BACKGROUND

The facts in the record relevant to the statute of limitations question may be briefly stated as follows. Plaintiff Melvin Saunders was first diagnosed as having asbestosis on November 6, 1981 and filed his suit against various asbestos manufacturers on December 9, 1983. Plaintiff John Grimes was diagnosed to have asbestosis on February 22, 1982 and filed his claim on May 30, 1984. Plaintiff George Pruden, who was first diagnosed as having asbestosis on June 6, 1982, filed suit less than two years later on May 24, 1984.[4]

1984); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983); *Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir. 1983).

[3] Although the case is styled *Oman v. Johns-Manville Corp.*, it is the appeal of this Court's rulings in *White II* on remand.

[4] Defendants originally claimed that Pruden admitted that his asbestos-related injury existed more than two years prior to the filing of his suit on May 24, 1984. The alleged admission resulted from Pruden's failure to respond to a request for admission that asked him to admit or deny that his injury existed on or before May 25, 1982. The failure to respond to a request for an admission within the prescribed 30-day period conclusively establishes the

Although the question of when Virginia's personal injury statute begins to run is problematic, injury occurs and the statute begins to run *no later than* the date the initial diagnosis of injury is made. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 959, 275 S.E.2d 900, 905 (1981); *Large v. Bucyrus-Erie Co.*, 524 F. Supp. 285, 287 (E.D. Va. 1981), *aff'd*, 707 F.2d 94 (4th Cir. 1983); *cf.* Va. Code Ann. § 8.01-249, subd. 4 (Supp. 1985) (accrual occurs when the diagnosis is first communicated to the plaintiff, *see* Part II, *infra*). Thus, if Virginia's two-year personal injury statute of limitations applies, the claims of Grimes and Saunders are time-barred. Pruden's claim, however, is not time-barred for the reasons set forth above.

In an attempt to avoid the claim-preclusive effect the two-year statute of limitations would have on the claims of Grimes and Saunders as well as other C/P 77-1 cases, plaintiffs argue that:

1. The *Oman* decision should not be applied retroactively to bar the claims of injured shipyard asbestos workers who delayed filing their claims in reliance upon the *White II* decision; and

2. Section 8.01-249, subd. 4 of the Virginia Code, which provides that a cause of action for an asbestos-related injury accrues when a diagnosis of an asbestos-related disease is communicated to an individual, should be applied retroactively to asbestos claims pending before the statute's effective date, July 1, 1985.

I. RETROACTIVE APPLICATION OF OMAN

The Fourth Circuit expressly stated in *Oman* that its decision should be applied retroactively:

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subject matter of the request for admission. F.R.Civ.P. 36(a). Plaintiff brought to this Court's attention, however, that the admitted fact here is not dispositive because of the five-day gap between May 24, 1982 and May 29, 1982. Accordingly, as defendants concede, the admission alone cannot support a motion for summary judgment on the statute of limitations.

> Plaintiffs argue that this decision should be applied prospectively only. *We disagree and apply it retroactively and prospectively.* With this decision we are not changing the law concerning admiralty jurisdiction but are correcting an erroneous application of the nexus requirements. *White II* failed to recognize what type of activities satisfy the maritime nexus test and defendants from the very beginning of this litigation have consistently objected to admiralty jurisdiction. They should not be denied the fruits of their labor in finally convincing a majority of this Court of the merit of their position.

764 F.2d at 232 (emphasis added). Plaintiffs contend, however, that *Oman* should be applied retroactively only to the parties in *Oman*. Plaintiffs argue for selective retroactive application on grounds that the parties in *Oman*, who were also parties in *White II*, could not have relied on the Fourth Circuit's extension of admiralty jurisdiction in *White II*.

While retroactive application of judicial decisions is neither compelled nor prohibited by the United States Constitution, *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 1737, 14 L.Ed.2d 601 (1965), the general rule is that judicial decisions are to be applied retroactively. *Cash v. Califano*, 621 F.2d 626, 628 (4th Cir. 1980); *Simpson v. Director, Office of Workers Compensation Programs*, 681 F.2d 81, 84 (1st Cir. 1982), *cert. denied*, 459 U.S. 1127, 103 S.Ct. 762, 74 L.Ed.2d 977 (1983). The strong presumption in favor of retroactivity cannot easily be overcome. *Simpson*, 681 F.2d at 84; *see Cash*, 621 F.2d at 629 (party opposing retroactivity bears burden of demonstrating that decision should be applied prospectively).

Unless otherwise stated, judicial decisions are automatically applied "retroactively" to the parties before the court, and are implicitly applied retroactively to all other potential litigants. *Cash*, 621 F.2d at 628; *Smith v.*

General Motors Corp., 747 F.2d 372, 375 (6th Cir.1984) (en banc); *see Zemonick v. Consolidated Coal Co.*, 762 F.2d 381, 389-90 (4th Cir.) (Ervin, J., dissenting), *reh'g en banc granted*, 775 F.2d 1175 (1985). Thus, where an appellate court applies its decisions to the parties before it, but is silent as to whether the decision is to be given general retroactive effect, courts generally find further analysis of the retroactivity question to be unnecessary. *Smith*, 747 F.2d at 375; *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239, 241 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 512, 83 L.Ed.2d 402 (1984). Nevertheless, an appellate court's silence on the issue can create an opportunity for subsequent litigants to successfully raise the retroactivity question. *Zemonick*, 762 F.2d 383-85; *see generally Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-09, 92 S.Ct. 349, 354-56, 30 L.Ed.2d 296 (1971).

Here, however, the Fourth Circuit was not silent on the issue, and its clear mandate of retroactive application governs in this case. The Fourth Circuit had, after all, stayed proceedings in all shipyard worker asbestos cases pending the outcome of the Court's reconsideration of *White II*. Under these circumstances, had the Fourth Circuit intended that *Oman be* given only selective retroactive application, it would have clearly stated that intention. It is simply asking too much of this Court to expect it to deny retroactive application of *Oman* to cases stayed pending *Oman* where the Fourth Circuit has decreed that its decision is to be applied retroactively.

The Court is thus compelled under *Oman* to apply Virginia's statue of limitations to the asbestos-related cases now before it. However, even if this Court were to overlook the Fourth Circuit's explicit handling of the retroactivity issue in *Oman* and apply its own independent consideration of the guidelines on the retroactive application of a statute of limitations laid down by the Supreme Court in *Chevron*, the result would be the

same. The Supreme Court described the analytical framework as follows:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the ruling question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S.Ct. at 355 (citations omitted).

A. RELIANCE ON PAST PRECEDENT

To prevail with their *Chevron*-based estoppel argument, the plaintiffs must demonstrate not only that they and other litigants relied on *White II*, but also that their reliance was justified. Here, plaintiffs have established neither. There is nothing in the record other than statements of counsel that would form the factual basis for a reliance argument. While a general decision on retroactivity should not be made on the basis of specific and thus perhaps aberrational facts, the facts of the cases before the Court are valuable to the extent that they "typify general patterns of reliance." *Simpson*, 681 F.2d at 86 (Court concluded that once a *Chevron* analysis is performed on a rule of law, the result—either prospective

or retroactive—should apply to all subsequent cases). Moreover, even if the plaintiffs relied on *White II*, that reliance would not have been reasonable or justifiable given the unsettled nature of the law prior to *Oman*.

When judicial decisions are limited to prospective application it is invariably because litigants substantially and justifiably relied on well-established prior law. *See Cash*, 621 F.2d at 629; *National Ass'n of Broadcasters v. Federal Communication Commission*, 554 F.2d 1118, 1132 (D.C.Cir. 1976). For instance, in *Chevron*, the new principle of law "effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit" on a statute of limitations issue. 404 U.S. at 107, 92 S.Ct. at 355; *see also Zemonick*, 762 F.2d at 385 (settled rule had been unquestioned for over ten years). Under the circumstances present in *Chevron* and *Zemonick*, the plaintiffs reasonably relied on longstanding prior law. *Chevron*, 404 U.S. at 107, 92 S.Ct. at 355; *Zemonick*, 762 F.2d at 386.

Reliance on *White II*, on the other hand, was much less justifiable. *White II*, a case of first impression on which final judgment had not then been entered, was the only precedent supporting the application of maritime law to cases involving injuries to land-based ship repair workers. In comparison with the prior law, *White II* was an aberration. The Fourth Circuit later characterized the *White II* extension of admiralty jurisdiction as "an erroneous application of the nexus requirements [set forth in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972) and *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982)]." *Oman*, 764 F.2d at 232.

Further, in early 1983, three United States Courts of Appeals held that admiralty law should not be applied in shipyard worker asbestos cases, and in so doing, each specifically declined to follow the holding in *White II*.

Austin v. Unarco Industries, Inc., 705 F.2d 1, 9 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 967, 971 (9th Cir.1983).[5] These three decisions were issued nine to eleven months before the claim of plaintiff Grimes was barred by the running of the Virginia statute of limitations (longer periods for Saunders and Pruden), and served as fair warning of the weakness of the *White II* decision.

A reliable indicator of the degree of justifiable reliance on the prior law is the extent to which litigants considered the issue settled prior to the issuance of the decision sought to be applied retroactively. For instance, the Fourth Circuit did not retroactively apply a statute of limitations in *Zemonick* where the defendants in their responsive pleadings had raised no question as to the timeliness of the filing of plaintiff's complaint. 762 F.2d at 385. Here, however, even after *White II* was issued, the defendants consistently challenged the applicability of admiralty jurisdiction in shipyard asbestos cases. *See, e.g.*, June 27, 1984 Answer and Grounds of Defense of Porter Hayden Company to Plaintiff's Complaint at Par. 2; Owens-Corning Fiberglas Corp. Preliminary Statement of Issues filed June 26, 1984 at Par. 23. Since the same group of counsel ends up opposing each other in most of these shipyard worker asbestos cases, plaintiffs' counsel were well aware of the defendants' persistence on the statute of limitations issue.

In fact, *Oman* involved the same facts, essentially the same counsel, and the four remaining plaintiffs from *White II*. The circuitous voyage of the four *Oman* plaintiffs through the federal court system highlights the unsettled nature of the legal issues addressed in *White II*. The case was not finally terminated until the United States Supreme Court denied certiorari on *Oman* in No-

[5] Courts of Appeals for the Fifth and Eleventh Circuits rejected the *White II* holding in 1984. *See supra* n. 2.

vember of 1985, almost ten years after their claims were filed.

The defendants' persistence, combined with the unsettled procedural posture of *Oman* and the signals sent by the other circuits' rejection of the *White II* analysis, should have placed plaintiffs on notice as to the vulnerability of their position. At best, then, the theory that admiralty jurisdiction existed in these shipyard worker cases was in its "embryonic stages," *see Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 667 F.2d 1074, 1085 (3d Cir.1982), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384 (1982), and was thus too uncertain to be reasonably relied upon by plaintiffs.

B. THE PURPOSE OF THE OMAN RULING

The second factor in the *Chevron* analysis, whether retroactive application of *Oman* will "further or retard its operation," *Chevron*, 404 U.S. at 106-07, 92 S.Ct. at 355, also counsels in favor of retroactivity. To limit *Oman* to prospective application would rob it of much of its significance given that the Fourth Circuit stayed a large number of asbestos suits (including these plaintiffs' suits) pending its decision in *Oman*.

In addition, the primary rationale for the Court's restriction of admiralty jurisdiction in *Oman* would be undercut if the decision applied prospectively only. The *Oman* court premised its decision on federalism-based concerns over admiralty law's preemption of "state regulation of matters traditionally within the ambit of local control," 764 F.2d at 227. Tort law in general, including the statutes of limitation applicable in tort cases, is an area of traditional state regulation. An indication of state interest in the substantive rights associated with statutes of limitation is § 8.01-234 of the Code of Virginia, which provides that an action barred by a statute of limitations is not revived by repeal of that limitation provision. *See also* Part II *infra*. Moreover, the Fourth

Circuit directly addressed plaintiff's complaints over the potential harshness of Virginia's statute of limitations, stating:

> Plaintiffs are understandably concerned about the problems they face with the Virginia statute of limitations. The potential injustice to these plaintiffs from the application of a short statute of limitations does not mandate this Court to assert its admiralty jurisdiction. "By granting the federal court's jurisdiction over maritime disputes, the constitution does not license them to repair injustice wherever they may perceive it. The purpose of admiralty jurisdiction is not to permit the federal courts to recognize the causes of action for claims they believe meritorious whenever state law precludes such claims." . . . Virginia's statute of limitation is a matter of state concern, governed by state law, which we may not interfere with in this case.

764 F.2d at 232 (citation omitted). The *Oman* court's concern over preemption of Virginia's statute of limitations applies with equal force to plaintiffs' cases as it does to the parties in *Oman*.

Finally, the "federal interest in uniformity of the law governing maritime matters. . . ." 764 F.2d at 232, would be undercut if *Oman* is only applied prospectively. Following the *Oman* court's reversal of *White II*, the six Courts of Appeals that have reached the issue are in agreement as to the inapplicabiilty of admiralty law in shipyard worker asbestos cases. Yet if *Oman* is not applied retroactively, the maritime tort statute of limitations, 46 U.S.C. § 763a, would apply to a sizable group of shipyard worker asbestos plaintiffs but only within the Fourth Circuit. The Court, therefore, concludes the purposes underlying *Oman* support applying the decision retroactively.

C. THE EQUITIES OF RETROACTIVE APPLICATION

Certainly, the application of Virginia's short statute of limitations in asbestos-related cases involves some "potential injustice." *Oman*, 764 F.2d at 232. This potential injustice, however, is not limited to plaintiffs who filed their claims after *White II* was decided. The plaintiffs in *Oman* relied on *White II* to the extent they expended money and effort in bringing their claims to trial on remand after *White II*. Nevertheless, the Fourth Circuit chose to apply its decision retroactively to the *Oman* plaintiffs. While the parties now before the Court arguably relied on *White II* to a larger degree than the parties in *Oman*, this reliance was unjustified given the unsettled, developing nature of the law concerning admiralty jurisdiction in shipyard asbestos cases. Also, the Court must not ignore the inequities that would be suffered by the defendants if *Oman* were not applied retroactively. The defendants, both here and in *Oman*, have "consistently objected to admiralty jurisdiction . . . [and] should not be denied the fruits of their labor in convincing a majority of [the Fourth Circuit] of the merit of their position." *Oman*, 764 F.2d at 232.

In short, plaintiffs have not overcome the recognized presumption in favor of retroactivity. *Simpson*, 681 F.2d at 84; *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir. 1983) (all three *Chevron* factors must be met by party opposing retroactive application). Accordingly, the Court HOLDS that the *Oman* decision should be retroactively applied.

II. RETROACTIVE APPLICATION OF § 8.01-249.4 OF THE VIRGINIA CODE

Plaintiffs contend that § 8.01-249, subd. 4 of the Virginia Code should be applied retroactively to asbestos-related personal injury claims pending before the statute's effective date, July 1, 1985. Section 8.01-249 provide in pertinent part:

> The cause of action in the actions herein listed shall be deemed to accrue as follows:
>
> * * * *
>
> 4. In actions for injury to the person resulting from exposure to asbestos or products containing asbestos, when a diagnosis of asbestosis, interstitial fibrosis, mesothelioma or other disabling asbestos-related injury or disease is first communicated to the person or his agent by a physician. However, no such action may be brought more than two years after the death of such person.

Va. Code Ann. § 8.01-249 (Supp. 1985).

Plaintiffs' argument that § 8.01-249 should be applied retroactively was rejected by the Western District of Virginia in *Palmer v. Norfolk & Western Railway Co.*, 646 F. Supp. 610, 612 (W.D. Va. 1985) (Kiser, J.). For the reasons that follow, the Court agrees with Judge Kiser and applies the statute prospectively only.

In contrast to rules established in judicial decisions, statutes generally are applied prospectively, absent a clear and unequivocal expression by the legislature to the contrary. *Estate of Armentrout v. International Harvester*, 547 F. Supp. 136, 137 (W.D. Va. 1982); 73 Am. Jur.2d *Statutes* § 350 (1974). In Virginia, where the statute involved is a statute of limitation, the general rule applies:

> There appears to be no good reason for excluding statutes of limitations, or remedial statutes, from the general rule, that retroactive or retrospective legislation is not favored, in the absence of any words expressing a contrary intention. Undoubtedly, the Legislature may declare a statute dealing with remedial legislation, or one not affecting vested rights, to have a retroactive operation. It is reasonable to conclude that the failure to express an inten-

tion to make a statute retroactive evidence a lack of such intention.

Ferguson v. Ferguson, 169 Va. 77, 86-87, 192 S.E. 774, 777 (1937); *Phipps v. Sutherland*, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959).

Moreover, Virginia's policy favoring prospective application of statutes of limitations is codified both in § 8.01-234 and § 8.01-256 of the Code of Virginia. Section 8.01-234 provides that an action barred by a statute of limitations is not revived by repeal of that limitation provision. Section 8.01-256 provides that the 1977 amendments to the limitation provisions are inapplicable to any cause of action that accrued prior to the effective date of those amendments.

Plaintiffs contend, however, that § 8.01-249, subd. 4 does not fit within the rule of *Ferguson* and is outside the scope of § 8.01-234 and 8.01-256 because it is merely procedural. There is some support in Virginia case law for the proposition that the rule of *Ferguson* is "somewhat relaxed" where the statute only affects questions of procedure. *Duffy v. Hartsock*, 187 Va. 406, 417, 46 S.E.2d 570, 575 (1948). Plaintiffs assert that because § 8.01-249 does not change the *period* of time provided to a plaintiff for filing an action, and therefore does not affect substantive or vested rights, it should be considered a procedural provision. The Court disagrees. The accrual provision incorporated into a statute of limitations is as much a part of a statute of limitations as the time allotted for filing a claim after a claim has accrued. Since, as stated above, statutes of limitation and amendments to statutes of limitations are given prospective effect absent the legislature's indication of intention to do otherwise, provisions directly affecting statutes of limitation should be given equivalent treatment.

However, even if a statutory amendment affecting accrual under a statute of limitations, such as § 8.01-249,

were to be considered a procedural or remedial matter, the Court would not give it retroactive effect absent *some* indication that the legislature intended it to be so applied. *Estate of Armentrout*, 547 F. Supp. at 138 n.6; *see Forbes v. Kenley*, 227 Va. 55, 59-60, 314 S.E.2d 49, 51-52 (1984). Here, no such intent is present from the language of the statute or its legislative history. *Palmer*, at ——, slip op. at 3. To the contrary, the opposite inference can be drawn from the language of § 8.01-250.1 of the Virginia Code which was enacted during the same legislative session as § 8.01-249, subd. 4. Section 8.01-250.1 provides for the recovery of costs of removing asbestos material from certain buildings and expressly provided for the retroactive revival of time-barred actions for the recovery of such costs. Thus, it is safe to conclude that had the legislature intended § 8.01-249 to apply retroactively, they would have incorporated similar language into the statute. Under these circumstances, § 8.01-249 simply cannot be applied retroactively.

CONCLUSION

The Court, therefore, HOLDS that Virginia's two-year personal injury statute of limitations, Va. Code Ann. § 8.01-243(A), applies retroactively to cases filed prior to the Fourth Circuit's ruling in *Oman*, and that § 8.01-249 of the Virginia Code only applies to cases filed after its effective date, July 1, 1985. Accordingly, the claims of plaintiffs Grimes and Saunders are barred by the statute of limitations as a matter of law and the defendants are GRANTED summary judgment. For the reasons stated, Civil Action Nos. 83-223-N and 84-262-NN are DISMISSED with prejudice. The motions for summary judgment in Pruden's case are DENIED, the defendants having failed to establish that he was injured more than two years prior to the filing of his claim.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 82-1821, 82-2042

JAMES T. OMAN; FRED R. WALKER; WILLIE A. GIBBONS, and HUGH V. REYNOLDS,

Appellees,

v.

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; RAYBESTOS-MANHATTAN, INC.; THE CELOTEX CORPORATION; UNARCO INDUSTRIES, INC.; H.K. PORTER COMPANY; SOUTHERN TEXTILE CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLAS CORP.,

Defendants,

and

PITTSBURGH CORNING CORPORATION,

Appellant.

JAMES T. OMAN; FRED R. WALKER; WILLIE A. GIBBONS and HUGH V. REYNOLDS,

Appellees,

v.

JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORPORATION, Successor by merger with Johns-Manville Products Corporation; THE CELOTEX CORPORATION; UNARCO INDUSTRIES, INC.; SOUTHERN TEXTILE CORPORATION and EAGLE-PICHER INDUSTRIES, INC.,

Defendants,

and

RAYBESTOS MANHATTAN, INC. (now Raymark Industries, Inc.); H.K. PORTER COMPANY and PITTSBURGH CORNING CORPORATION,

Appellants.

Argued Oct. 2, 1984

Decided June 6, 1985

Archibald Wallace, III, Richmond, Va. (Nathan H. Smith, Sands, Anderson, Marks & Miller, Richmond, Va., John B. King, Jr., Robert L. O'Donnell, Vandeventer, Black, Meredith & Martin, Norfolk, Va., William V. Hoyle, Charles A. Smith, W. Vinton Hoyle, Jr., Hoyle, Corbett, Hubbard & Smith, Newport News, Va., on brief), for appellant.

Joel I. Klein, Washington, D.C. (Paul M. Smith, Onek, Klein & Farr, Washington, D.C., Robert R. Hatten, Patten, Wornom & Watkins, Newport News, Va., Richard S. Glasser, Glasser & Glasser, Norfolk, Va., on brief), for appellees.

Before WINTER, Chief Judge, and WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges.

CHAPMAN, Circuit Judge:

In this consolidated appeal we consider whether the federal courts may assert admiralty jurisdiction over manufacturers of products containing asbestos for injuries to land-based ship repair workers which injuries were allegedly caused by exposure to air-borne asbestos fibers. The parties argued this appeal before a three-judge panel on November 1, 1983. On June 6, 1984, this Court, *sua sponte*, called for an *en banc* hearing of this appeal to reconsider *White v. Johns-Manville Corporation*, 662 F.2d 234 (4th Cir. 1981) (*White II*). Today we overrule *White II*, adopt a four-part nexus test and hold, under the nexus test, that the federal courts may not exercise admiralty jurisdiction over damage claims by land-based ship repair or construction workers for employment-related, asbestos induced disease. In doing

so we reverse the district court and remand the case for further proceedings consistent with this opinion.

I

This appeal grows out of four of the thousands of cases brought throughout this country against the manufacturers of asbestos containing products by workers who have contracted asbestosis and its related diseases. Plaintiffs, James T. Oman, Fred R. Walker, Hugh V. Reynolds, and Willie A. Gibbons, were land-based shipyard workers for Newport News Shipbuilding and Drydock Company. They claim to have contracted asbestosis after being exposed to asbestos fibers in the course of their employment.

In 1976 each plaintiff brought an action in federal court against the defendants, Johns-Manville Corp., Johns-Manville Sales Corporation, successor by merger with Johns-Manville Products Corporation; Raybestos-Manhattan, Inc.; The Celotex Corporation; Unarco Industries, Inc.; H.K. Porter Company; Southern Textile Corporation; Eagle-Picher Industries, Inc.; Owens-Corning Fiberglas Corp. Generally, injured workers bring these types of actions in state court or in the federal courts under disversity jurisdiction. In either forum state substantive law governs. These plaintiffs, however, alleged that the district court could exercise its admiralty jurisdiction in their cases because of their employment in a shipyard. They claim to be in admiralty but they admittedly do not perform tasks traditionally done by sailors.

After consolidating these cases, the district court, in March 1978, issued an order declining to assert admiralty jurisdiction because the alleged injuries bore no reasonable relationship to traditional maritime activity. Throughout the entire history of these cases the defendants have objected to the exercise of admiralty jurisdiction.

After the trial of their cases plaintiffs appealed from the March 1978 order, as well as two others.[1] A three-judge panel of this court vacated the order of the district court. *White*, 662 F.2d at 238-40.

Since *White II* was decided five other courts of appeal[2] have considered this issue and for different reasons have rejected *White II* either in whole or in part. By different analyses, each circuit has concluded that admiralty jurisdiction does not extend to damage claims by land-based ship repair or construction workers for employment-related, asbestos-induced disease.

We now join these circuits. Before we conduct the analysis by which we reach this decision, we must discuss admiralty jurisdiction in general and our reasons for overruling *White II*.

II

Historically, federal courts used a situs or locality test to determine if a tort action was within admiralty jurisdiction. If the tort occurred upon the high seas or navigable waters the federal court could exercise its admiralty jurisdiction pursuant to Article II, Section 2 of the United States Constitution and 28 U.S.C. § 1333(1). *See The Plymouth*, 70 U.S. (3 Wall) 20, 35-36, 18 L.Ed. 125 (1866). The federal courts tend to exercise admiralty jurisdiction restrictively because its use invokes substantive maritime law which "may tend to preempt state regulation of matters traditionally within the ambit of local control." *Harville v. Johns-Manville Products*

[1] See *White II* for a complete procedural history of this case.

[2] *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir. 1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983); *Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir. 1983).

Corp., 731 F.2d 775, 780 (11th Cir.1984). In discussing this principle the Supreme Court has stated:

> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined.

Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 272-73, 93 S.Ct. 493, 506-07, 34 L.Ed.2d 454 (1972) (quoting *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212, 92 S.Ct. 418, 425, 30 L.Ed.2d 383 (1971)).

In *Executive Jet* the Supreme Court rejected the use of the mechanical and simplistic locality test as the exclusive test for admiralty jurisdiction. In reaching this decision the Supreme Court discussed some of the problems with the locality test, especially the absurdity of invoking admiralty jurisdiction for torts which satisfy the locality test, but have absolutely no connection with maritime activity, *Executive Jet*, 409 U.S. at 255-56, 93 S.Ct. at 498, and discussed the creation of numerous exceptions to the rule. *Id.* at 259-60, 93 S.Ct. at 500. In light of this, the Supreme Court held that the location of the tort in maritime waters was insufficient by itself to invoke admiralty jurisdiction. To the traditional maritime location requirement the Court added an additional requirement that the wrong bear a "significant relationship to traditional maritime activity." *Id.* at 268, 93 S.Ct. at 504. In applying this additional nexus requirement the Court found it necessary to consider the history and purpose of admiralty law:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world,

> beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

Id. at 269-70, 93 S.Ct. at 505. This rationale underlying admiralty jurisdiction gives us guidance in deciding when the "law of the sea" should govern a particular case.

Executive Jet involved the crash of an airplane into Lake Erie and the Supreme Court did not clearly indicate that the additional nexus requirement applied to all tort cases in which a party sought to invoke admiralty jurisdiction. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), the Supreme Court made it clear that this two part test for admiralty jurisdiction applied to all tort cases in which a party sought to invoke the federal court's admiralty jurisdiction. *Id.* at 674, 102 S.Ct. at 2658; *see Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984); *Harville*, 731 F.2d at 781.

III

We must review *White II* in light of the Supreme Court's reasoning in *Executive Jet* and *Foremost Insurance*. In *White II* this court first held that the location test had been met. We agree with *White II* that the plaintiffs' injuries satisfy the locality test.

> In the present case, the plaintiff employees alleged in their complaint that they had installed asbestos

> insulation materials during ship construction and repair in the course of their employment with Newport News. Their work was performed at both the shipyard and drydock areas as well as aboard the vessels while they were located on navigable waters. Thus, the allegations would meet the locality test of *Executive Jet*.

White II, 662 F.2d at 239; *Harville*, 731 F.2d at 783.

The court then held that the work done in the shipyards by the plaintiffs bore a significant relationship to traditional maritime activity because the installation of the asbestos products has a direct effect on marine navigation and commerce. *White II*, 662 F.2d at 239.

> [E]ach of these employees spent a significant part of his working career in the fabrication and replacement of various types of asbestos insulation materials for use on public and private ships. Without such shipyard efforts, these vessels would have been unable to perform their maritime role as carriers of people and cargo. Thus, installation of insulation materials, which by their very nature become an appurtenance, or integral part, of the ship, is clearly essential to the maritime industry. Therefore, the work done by these shipyards bears a "significant relationship to traditional maritime activity" because the installation of the asbestos products has a direct effect on marine navigation and commerce.

That second holding was then limited to the particular circumstances of the cases, "when the materials used by these shipyard workers were designed, advertised and marketed as maritime asbestos products . . ." *Id.* at 240.

We are overruling *White II* for two reasons: (1) the analysis used to reach the holding that the nexus test had been met is flawed and (2) the cases relied on by the Court in *White II* are distinguishable. In discussing the

nexus test and *Executive Jet*, the Court stated, "The opinion of the [Supreme] Court [in *Executive Jet*] gives no indication as to what actual activities would satisfy the maritime 'nexus' test." *Id.* at 239. The court overlooked the Supreme Court's discussion of the history and purpose of admiralty law, see *Executive Jet*, 409 U.S. at 269-70, 93 S.Ct. at 505 (quoted *supra* p. 227), which does give use guidance concerning the activities which satisfy the nexus test.

The Court, without the benefit of this guidance, then proceeded to analyze the facts in *White II* to determine if the nexus test had been met. In its analysis the Court focused almost exclusively on the function of the plaintiffs to reach its holding. "Hence, we must examine the function of these shipyard workers in fathoming their relationship to maritime commerce and navigation." *Id.* at 239. Although *White II* correctly discussed the importance to the maritime industry of the work done by these plaintiffs at the shipyards, nevertheless the Court reached the wrong conclusion because the Court failed to examine all the factors necessary for a complete analysis of the nexus relationship. By focusing exclusively on the plaintiffs and the work they performed, this Court overemphasized that factor and, in effect, created a mechanical test inconsistent with the Supreme Court's reasoning in *Executive Jet* and *Foremost Insurance*.

Also, in focusing on the plaintiff's activities the Court failed to consider that the activities of these plaintiffs were not the types of activities traditionally done by sailors.

Furthermore, the cases relied upon for support in *White II* are distinguishable. *White II* relied on *Pan-Alaska Fisheries, Inc. v. Marine Construction*, 565 F.2d 1129 (9th Cir.1977); *JIG the Third Corp. v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975); *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir.1978); and *Sperry Rand*

Corp. v. Radio Corporation of America, 618 F.2d 319 (5th Cir.1980). In *Pan-Alaska* a ship caught fire and sank because of a defective fuel filter. In *JIG the Third Corp.* a ship sank because of a malfunctioning steel shaft. In *Jones* the ship's engine repeatedly failed because of manufacturer defects in the engine. In *Sperry Rand* the vessel grounded and was involved in a collision because of a defect in its gyro-pilot steering system. Unlike the present cases those four cases involve situations in which the defective products caused injuries to the ship which specifically implicated the maritime concerns discussed by the Supreme Court in *Executive Jet*. See *supra* p. 227.

The present cases involve injuries which do not implicate those maritime concerns and are not unique to seamen.

> The plaintiffs here were engaged in trades, such as pipefitting, welding, and insulating, linked more with the land than with the sea. Their skills and training are those of landsmen, not of sailors. The plaintiffs' "role and function", although related to maritime commerce do not call for the application of admiralty jurisdiction . . . Nothing about the underlying claims would be different if the plaintiffs had been employed constructing or repairing buildings on land. . . . We can foresee no way in which a result in this case in favor of either the land-based shipyard workers or the asbestos manufacturing defendants will have any more than the most attenuated impact on maritime commerce. None of the issues that the Supreme Court listed in *Executive Jet* are involved. Rather, the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution.

Harville, 731 F.2d at 785 and 786.

In this case the injury producing material was not the insulation but the asbestos fibers contained within the insulation. These naturally occurring fibers do not raise the same concerns as a gyro-pilot steering system; nor do the injuries produced by these fibers raise the same maritime concerns as the injuries caused by the malfunctioning steel shaft, the defects in the engine, or the defects in the fuel filter.

This would be a completely different case if these manufacturers were being sued becasue the asbestos was defective and, as a result, a fire spread throughout a ship causing it to sink. In such case the injury would be peculiar to admiralty and would invoke maritime concerns such as those mentioned by the Supreme Court in *Executive Jet. See Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 10-11 (1st Cir.1983).

Furthermore, the requirement in *White II* that the materials which caused the injuries be designed, advertised, and marketed as maritime products creates a mechanical analysis inconsistent with *Executive Jet* and *Foremost Insurance*. Under this requirement the nexus test would be met with some products whose use in maritime commerce is important but which do not raise the traditional maritime concerns discussed in *Executive Jet*. Other products which were not designed, advertised, and marketed as maritime products, but do invoke those maritime concerns, would not satisfy the nexus test. *See Austin*, 705 F.2d 9-11.

IV

Instead of the *White II* analysis, we adopt a nexus test by which we must consider four factors[3] in analyzing the relationship a given claim bears to traditional mari-

[3] The other circuits which have considered this issue have considered either some or all of these four factors. We believe that a thorough analysis of the nexus requirement should include a consideration of at least these four factors.

time activity: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law. *Myhran*, 741 F.2d at 1121; *Harville*, 731 F.2d at 783; *Owens-Illinois v. United States District Court*, 698 F.2d 967, 9th Cir.1983).

Although the plaintiffs have met the locality test, we hold that their claims are not cognizable in admiralty because their claims do not bear a significant relationship to traditional maritime activity under our applcation of the four part nexus test. First we must consider the functions and roles of both the plaintiffs and the defendants. The function and role of the defendants slightly favor the exercise of admiralty jurisdiction. The materials used by the shipyard workers were "designed, advertised and marketed as maritime asbestos products. . . ." *White II*, 662 F.2d at 240; *but see Harville*, 731 F.2d 784 ("The defendants [as in this case Johns-Manville] . . . are land-based manufacturers whose asbestos products, although important components in the construction and maintenance of vessels, were not designed specifically for maritime use."); *Austin*, 705 F.2d at 10 (". . . whatever advantage accrues from a uniform national law governing those cases would be severely undercut by distinguishing between manufacturers according to whether they designed or intended their products for maritime use"). Of the four factors this part of the first factor is the only one which favors the exercise of admiralty jurisdiction.

Next we consider the function and role of the plaintiffs. All four were pipe coverers or insulators. As we we have discussed, *supra* p. 228, we agree with *White II* that the work done by these plaintiffs was important to maritime commerce. *White II*, however, overemphasized the role and function of the plaintiffs and, in so doing, elevated their function into something it is not—a maritime activity.

Importance to maritime commerce by itself is not sufficient to bring an activity within the scope of admiralty jurisdiction. *Harville*, 731 F.2d at 784. To be in admiralty the plaintiffs must have been doing what sailors normally do or used to do.

> More germaine is whether the activity is of a "maritime" nature. Courts have tended to describe contracts for ship repair as "maritime" . . . .Nevertheless, in a tort case to label a pipefitter's occupation "maritime" on Monday because he is working on repairs to a completed vessel and to call identical work done on Tuesday "non-maritime" because he labors aboard an unfinished hull, is to retreat into the same sort of mechanical analysis dependent on fortuity that the Supreme Court condemned in *Executive Jet*. . . . [T]he question properly asked is whether the actual tasks the workers perform bear any inherent relationship to maritime activity, that is, whether the plaintiffs' jobs are identical to those undertaken by land-based workers and are connected to maritime affairs merely because performed aboard ship, or whether they are tasks somehow unique to maritime service or work traditionally done by seaman.

Id. at 784-85 (citations omitted). As pipe coverers and insulators these plaintiffs had the skills and training of landsmen, and not of sailors. Sailors occasionally may be called upon to take out a patch of insulation and replace it in an emergency, but that type of activity is normally done by landsmen. Although their roles and functions were related to maritime commerce, this factor does not call for the application of admiralty jurisdiction. *Id.* at 785; *Myhran*, 741 F.2d at 1122; *see Lowe v. Ingalls Shipbuilding, a Division of Litton Systems, Inc.*, 723 F.2d 1173, 1188 (5th Cir.1984).

In *Lowe* the Fifth Circuit questioned *White II's* rationale that because the products "become an appurtenance,

or integral part, of the ship," therefore their installation "has a direct effect on marine navigation and commerce." *White II*, 662 F.2d at 239. The Fifth Circuit considered this rationale to be

> contrary to the rule that ship construction contracts are not maritime and to the statement in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157-66 L.Ed. 321 (1922), that neither a ship construction worker's "general employment" nor his work on an incomplete ship lying in navigable waters "had any direct relation to navigation or commerce" *Id.* at 476, 421 S.Ct. at 158. *White II* gives no express consideration to these principles.

Second we consider the causation and type of injury. "The non-maritime nature of the plaintiffs' injuries, injuries that now efflict thousands of land-based workers as well, militate strongly against application of maritime jurisdiction." *Harville*, 731 F.2d at 785; *see Myhran*, 741 F.2d at 1122-23 ("[A]sbestos does not bear any inherent relationship to maritime activity, nor is it unique to maritime service."); *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 971 (9th Cir.1983) ("[B]oth the injury and its cause are far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters."). We agree that the causation and type of injuries to the plaintiffs do not support the invocation of admiralty jurisdiction.

Third we examine the types of vehicles and instrumentalities involved. Although these plaintiffs were exposed to asbestos aboard ships, the involvement of the ships is at most tangential to the nature of their tort claims and has no effect on the character of those claims. These claims would be exactly the same if the plaintiffs had been employed constructing or repairing buildings on land. *Myhran*, 741 F.2d at 1122; *Harville*, 731 F.2d at 785.

> While ships were obviously involved here, the tools and safety equipment (or lack thereof) present in the installation and clean-up of asbestos—unlike the navigational equipment and safety devices of a vessel—possess few maritime attributes. The use of masks, unlike the provision of lifeboats, is hardly a precautionary measure distinctively connected to traditionally maritime activity.

Owens-Illinois, F98 F.2d at 971. The simple fact that these plaintiffs were injured aboard ship does not support or justify admiralty jurisdiction.

Insulation containing asbestos is the other instrumentality involved. Although the particular insulation products may have been designed, manufactured, and advertised as maritime or marine insulation, such insulation has no uniquely maritime character and exposure to asbestos does not bear any inherent relationship to maritime activity. *Myhran*, 741 F.2d at 1122; *Harville*, 731 F.2d at 785.

Finally we consider the traditional concepts of the role of admiralty law, the most important factor. We have previously discussed the history and purpose of admiralty law as described by the Supreme Court in *Executive Jet* and *Foremost Insurance*. Disputes which do not involve these interests should not fall within the admiralty jurisdiction of the federal courts. None of the issues listed by the Supreme Court in *Executive Jet* and *Foremost Insurance* are involved in this action.

> Rather, the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution. Absent congressional action, the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty.

Harville, 731 F.2d at 786. Furthermore, the resolution of these tort claims does not "require the special expertise of the court in admiralty as to navigation or water-based commerce, nor is there any federal interest in uniformity of decision requiring the application of federal substantive law." *Myhran*, 741 F.2d at 1122.

The federal interest in uniformity of the law governing maritime matters favors our decision in this case. Each circuit that has considered the issues raised in *White II* and in this case has rejected the exercise of admiralty jurisdiction. Thus, *White II* is a deviation from a uniform view held by the other circuits. With this decision uniformity is restored.

V

Plaintiffs argue that this decision should be applied prospectively only. We disagree and apply it retroactively and prospectively. With this decision we are not changing the law concerning admiralty jurisdiction but are correcting an erroneous application of the nexus requirements. *White II* failed to recognize what type of activities satisfy the maritime nexus test and the defendants from the very beginning of this litigation have consistently objected to admiralty jurisdiction. They should not be denied the fruits of their labor in finally convincing a majority of this court of the merit of their position.

Plaintiffs are understandably concerned about the problems they face with the Virginia statute of limitations. The potential injustice to these plaintiffs from the application of a short statute of limitations does not mandate this court to assert its admiralty jurisdiction. "By granting the federal courts jurisdiction over maritime disputes, the Constitution does not license them to repair injustice wherever they may perceive it. The purpose of admiralty jurisdiction is not to permit the federal courts to recognize causes of action for claims they be-

lieve meritorious whenever state law precludes such claims." *Harville*, 731 F.2d at 786. Virginia's statute of limitation is a matter of state concern, governed by state law, which we may not interfere with in this case.

VI

The defendants have raised three other issues for our consideration: (1) whether the district court abused its discretion concerning certain procedural matters at trial; (2) whether the district court erred in failing to grant certain motions by Raybestos and Pittsburg Corning for summary judgment or judgment NOV; and (3) whether the district court erred in charging the jury concerning the defendants' duty to warn these plaintiffs when the plaintiffs' employer had an equal or greater knowledge of the dangers associated with the allegedly defective product.

The defendants contend that the district court abused its discretion by denying their motions for a change of venue or a change of venire and by scheduling multiple plaitiffs' trials instead of individual trials. These are matters within the sound discretion of the district court. We have considered the arguments presented by the defendants and find that the district court did not abuse its discretion concerning these matters.

The second claim is that the district court failed to grant the motions of Raybestos and Pittsburg Corning for summary judgment or judgment NOV. Because we are remanding this case to the district court for further proceedings and because our decision in this appeal may have a profound effect upon the parties we refuse to reach this issue. The district court should reconsider this on remand.

The third and final issue presented for review concerns the sufficiency of the district court's charge to the jury regarding the defendants' duty to warn. The defendants argue that the district court should have charged the

jury that the manufacturers' duty to warn the ultimate users, the employees, is satisfied if a sophisticated employer is aware of the dangers involved in the use of the product.

In *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979), the Supreme Court of Virginia adopted *Restatement (Second) of Torts* § 388 (1965) to govern a manufacturer's duty to warn about dangers associated with a product's use.[4] *Featherall*, 219 Va. at 962, 252 S.E.2d at 366. Virginia law includes comment n of § 388, "Warnings given to third person." *Jones v. Meat Packers Equipment Co.*, 723 F.2d 370, 373 (4th Cir.1983); *Barnes v. Litton Indus. Products, Inc.*, 555 F.2d 1184, 1188 (4th Cir.1977); *Goodbar v. Whitehead Bros.*, 591 F.Supp. 552, 557 (W.D.Va. 1984).

Comment n discusses the various factors a court must balance to determine what precautions the manufacturer or supplier of a product must take to satisfy the requirement of reasonable care found in § 388(c) These factors include: (1) the dangerous condition of the product; (2) the purpose for which the product is used; (3) the form of any warnings given; (4) the reliability of the

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[4] Section 388 states:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c)fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

third party as a conduit of necessary information about the product; (5) the magnitude of the risk involved; and (6) the burdens imposed upon the supplier by requiring that he directly warn all users. These considerations must be balanced to determine if the manufacturer owes a duty to place a warning on his product.

In this case the product, because it contained asbestos fibers, was very dangerous. The burden on the manufacturers in placing a warning on the product was not great. The employer was unaware of the danger until 1964. Finally, once the employer became aware of the potential danger it failed to convey its knowledge to its employees. We cannot say that the district court erred in refusing to give the charge requested by the manufacturers under the set of facts involved in this case.[5]

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[5] Comment n to § 388 supports this conclusion:

> Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. It may well be that he should take the risk that this information may not be communicated, unless he exercises reasonable care to ascertain the character of the third person, or unless from previous experience with him or from the excellence of his reputation the supplier has positive reason to believe that he is careful. In addition to this, if the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful. Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practica-

The decision in the district court is reversed and this case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

K.K. HALL, Circuit Judge, dissenting:

Because I believe that the reasoning in *White v. Johns-Manville Corporation*, 662 F.2d 234 (4th Cir.1981) (*White II*) continues to be sound, I dissent from the majority's jurisdictional analysis in this case and adhere to my conclusion in *White II* which found the exercise of admiralty jurisdiction proper. I am also of the view that the majority's opinion overruling *White II* should be applied prospectively only.

I am authorized to state that Judge PHILLIPS joins me in this opinion.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent and adhere to the view I expressed in *White II*, 662 F.2d 234 at p. 241.

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ble and not unduly burdensome, it may well be that the supplier should be required to adopt them.